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## **NEWGOV**

### **New Modes of Governance**

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#### **Law, Governance or New Governance? The Changing Open Method of Co-ordination**

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## Summary

As a novel technique of governance within the European Union, the “open method of coordination” (OMC) has attracted a significant degree of attention from the political science and legal community. Typically, analyses of the OMC characterise it with regard to two dominant conceptual reference points: the dichotomies of old/new governance and of hard/soft law. In this paper, the authors signal their dissatisfaction with the explicit or implicit deployment of these binary classifications: while these dichotomies function as a shorthand for change, absent the prop of comparison, they provide little explanatory purchase on the nature of different coordination processes, differences across processes and changes within process. The paper develops its extended critique of the EU governance literature through the use of case-studies on the European Employment Strategy and the OMC on Social Protection and Social Inclusion.

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## I. Introduction

During the 1990s, the European Union began experimenting with a novel form of policy co-ordination. Developed initially to coordinate Member States' economic policies in the context of Economic and Monetary Union (EMU), the fashion for Member States to retain decision-making competence in a given policy domain, but to subject the exercise of that competence to a process of reporting, monitoring, evaluation and influence through E.U. decision-making structures spread to the sphere of employment policy through the European Employment Strategy (EES) before emerging as a more generalizable governance technique known as the Open Method of Coordination (OMC). The OMC was to be a key means of taking forwards the European Union's strategy of economic and social reform announced at the 2000 European Council meeting in Lisbon. Outside the realm of economic and employment policy co-ordination, the most developed form of OMC was initiated in the sphere of social inclusion policy; later merging with policy coordination processes, in the areas of pensions and health-care, to create an overarching OMC process on "Social Protection and Social Inclusion".

The materialization of OMC as a novel governance technique has attracted a very high level of scrutiny from academic scholars.<sup>1</sup> Even a cursory glance at this literature reveals the ubiquity of claims that it heralds a shift from "harder" to "softer," and from a traditional to a "new" mode of governance. Nonetheless, these assertions have also been accompanied by manifest ambiguity and contradiction: ambiguity as to whether it is law or governance that has become soft—with the shift to new modes of governance signaling the softening of law—and contradiction as between the identification of OMC as a form of "soft" law and the assertion that the OMC is essentially political or non-law like. Our task in this Article is to explore these ambiguities, contradictions, and limitations of prevailing and dominant characterisations of the OMC in legal and political science literature.

The paper is structured in the following manner. In Part I we begin by contextualizing the debate regarding the OMC within the broader theoretical literature on the "governance turn" in E.U. studies.<sup>2</sup> We suggest that this "turn" can be read in two different ways: in one sense, it is consistent with the "institutionalist turn" in European integration—focusing on day-to-day E.U. governing and the role of actors, institutions, rules, processes, and norms, but with an emphasis on the increasing diversity of governance techniques; while in another sense, the turn is imbued with more normative content in exploring the quality of governing against constitutional and democratic standards and the normative challenge of a shift from government to governance or "new governance." Within both these strands, the OMC has been central, presented as the key manifestation of a shift in E.U. governance patterns and architecture.

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<sup>1</sup> See generally: D. Hodson and I. Maher (2001), 'The Open Method as a new Mode of Governance: The Case of Soft Economic Policy Co-ordination' *Journal of Common Market Studies* 39:4, 719-46; C. de la Porte and P. Pochet (eds.), *Building Social Europe through the Open Method of Co-ordination* (Brussels: P.I.E. Peter Lang, 2002); J. Zeitlin and P. Pochet (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* (Brussels: P.I.E. Peter Lang, 2005); C. Radaelli, 'The Open Method of Coordination: A New Governance Architecture for the European Union?' SIEPS Report No. 1 (Stockholm: Swedish Institute for European Policy Studies, 2003); S. Regent (2003), 'The Open Method of Co-ordination: a new supranational form of governance?' *European Law Journal* 9:2, 190-214; S. Borrás and K. Jacobsson, 'The Open Method of Coordination and New Governance Patterns in the EU' (2004) *Journal of European Public Policy (Special Issue on OMC)* 11:2, 185-208; M. Barbera (ed.) *Nuove forme di regolazione: il metodo aperto di coordinamento delle politiche sociali* (Milan: Giuffrè, 2006); E. Szyszczak, 'Experimental Governance: The Open Method of Coordination' (2006) *European Law Journal* 12:4, 486-502.

<sup>2</sup> See the panoramic survey by B. Kohler-Koch and B. Rittberger, 'The "Governance Turn" in EU Studies' (2006) *Journal of Common Market Studies: Annual Review* 44, 27-49.

Nonetheless, our analysis suggests that although it is possible to shed some light on the nature of the OMC by comparing it either to earlier phases of E.U. governance or to other governance techniques or modes, such an approach is necessarily limiting and inadequate.

Part II critiques the analysis of the OMC in terms of a shift from “hard” to “soft” law with the Classic Community Method and OMC exemplifying the former and latter respectively. Although the “hard” and “soft” law labels have operated with some success as rough heuristic devices, we argue that they provide insufficient analytical purchase on the phenomenon they purport to capture.

Part III applies the dominant conceptual frameworks described in Parts I and II to the coordination of Member States’ employment and social inclusion policies.. Absent the prop of comparison to other governance techniques these frameworks, as well as possessing the ambiguities and contradictions discussed in Parts I and II, tend to leave un-illuminated the specific elements of particular OMC processes (by focusing on stylized differences between the OMC and other governance techniques); often underplay significant differences between OMC processes; and, in particular, have problems conceptualising change in any given OMC process over time.

## II. The (New) Governance Turn

The terms “governance,” “new modes of governance,” and “new governance” are frequently deployed to indicate a shift away from a certain traditional mode of governing associated with “government”.<sup>3</sup> Analysis of the shift from “government” to “(new) governance” constitutes the “governance turn” described by Kohler-Koch and Rittberger.<sup>4</sup> In Part I we consider the meaning of this turn. We begin by unpacking some recurring themes in this literature before suggesting that these themes are organized into two broader categories of literature: one category having a more empirical focus, with a tendency to emphasize the comparison and contrast between different governance techniques; while the other category has a more normative orientation towards the significance to be attached to emergent governance patterns.<sup>5</sup> We explore the possibilities and limitations of each category in making sense of the OMC.

### II.1 Defining “New (Modes of) Governance:” Six Themes

There are six recurring themes in literature that comprises the “governance turn.” These themes are not mutually exclusive and are frequently aggregated in accounts of the OMC and new governance.

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<sup>3</sup> While these terms typically points to a move away from centralised public hierarchical governance techniques, it is not always apparent whether they each suggest an arrival at the same conceptual destination. If treated as synonyms then nothing in fact distinguishes between ‘governance’ and what we will refer to as “new governance”. To be sure, the affix ‘new’ may refer to a temporal dimension. However, we would share Treib, Bähr and Falkner’s inclination that to reduce ‘new’ to a mere issue of the appearance of a new instrument on a time horizon is to produce an inherent redundancy in its analytical purchase, and therefore, any attempt to identify “new governance” must look to other resources: O. Treib, H. Bähr and G. Falkner, ‘Modes of Governance: A Note Towards Conceptual Clarification’, *European Governance Papers (EUROGOV)* No. N-05-52, <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-05-02.pdf>.

<sup>4</sup> Above n. 2.

<sup>5</sup> Kohler-Koch and Rittberger (above n 2) also distinguish between empirical and normative variants of the governance turn although our analysis does not directly utilise the distinction in the way that they draw it.

### **II.1.1 Theme One: Definition-by-Default—New Governance as “Not-Old” Governance**

One way of defining “new governance” is as an undifferentiated group whose identity is manifested largely by what it is considered not to be: in the EU context, this is typically the distinction drawn between the “Community Method” and multiple manifestations of “new (modes of) governance”. However, forms of default characterisation or reasoning by contrast – while capable of offering rough heuristics – are inevitably question-begging as to the indicators, attributes or signifiers through which the nature of governance is identified, compared, and contrasted.

### **II.1.2 Theme Two: Actors**

The shift from government to governance is typically identified with the involvement of private actors occupying distinctive roles alongside, or in substitution for, public actors and institutions. Nonetheless, this does not indicate whether there is anything qualitatively different about the involvement of private actors across a range of governance techniques, nor whether this shift—indicated by the use of the language of governance—is the same or different in “new governance.”

### **II.1.3 Theme Three: Tools or Instruments**

A level of differentiation may be made by focusing the analysis on tools or instruments of governance. Thus, while regulations and directives represent traditional E.U. governance tools, the OMC, E.U. social dialogue, and the use of framework directives are treated as “new governance” instruments. This differentiates between instruments and opens channels to interesting discussions of the combination of instruments in distinct policy domains, thus explaining the recent interest in hybrid governance regimes.<sup>6</sup> That said, we still need some means of analyzing: (a) under what conditions an instrument can claim to be an example of “new governance;” and (b) whether “new governance” is characterized only by certain archetypal instruments like the OMC. Although many instruments may be considered as candidate “new governance” instruments, there remains a strong background dichotomy of “old” and “new governance” as a broad organizing frame.

### **II.1.4 Theme Four: “Modes”**

One difficulty with the governance “turn” is that it often shifts between two different registers: it heralds both the emergence of new tools or instruments, but also alternative modes or techniques of governing. This can easily be demonstrated by the terminology of “new modes of governance.” Does this simply refer to the development of a new instrument, or does it also indicate a shift in the underlying mode or technique of governance?

The governance literature reveals some attempts to identify distinctive modes of governance. Kooiman, for example, distinguishes between “hierarchy,” “self-regulation,” and “co-regulation” modes.<sup>7</sup> Bulmer and Padgett distinguish between governance by “hierarchy,” by

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<sup>6</sup> D.M. Trubek and L.G. Trubek, ‘New Governance and Legal Regulation: Complementarity, Rivalry or Transformation?’ May 2006. Note they only consider the latter in which law and “new governance” merge into a new hybrid process to be true hybridity.

<sup>7</sup> J. Kooiman, *Governing as Governance* (London: Sage, 2003). It is noteworthy that Kooiman does not treat “coordination” as one of his ‘co-’ modes of governing: for him, coordination lies at an actor/institutional level rather than at the level of the mode of governing. This raises profound questions as to the suitability of treating the OMC as a mode of governance similar to, but different from, other EU governance modes.

“negotiation,” and by “facilitated coordination”.<sup>8</sup> Colin Scott suggests a four-fold classification of “control models”—“hierarchy,” “competition” or “market,” “community,” and “design”—while Newman proposes a somewhat different classification of “hierarchical,” “self-governance,” “rational,” and “open systems” models.<sup>9</sup> While all agree on “hierarchy” as a mode or model, the non-hierarchical candidates are differently categorized. This may explain why it is easier to define “new modes of governance” by what they are not—hierarchy—than how they might be characterised independently of the comparison.

Somewhat less abstract categorizations, and ones more directly related to patterns of E.U. governance, can also be found. Helen Wallace, for example, maps out what she considers to be the five central policy modes as variants of the E.U. policy process as a means of avoiding a different type of dichotomy: namely, that between “supranational” and “intergovernmental” governance. These modes are: (1) traditional Community Method; (2) regulatory policy-making; (3) a distributional mode; (4) policy coordination; and (5) intensive transgovernmentalism.<sup>10</sup> Scharpf, in discussing the “plurality of European governing modes” identifies a triptych of modes: (1) supranational centralization; (2) joint decision-making; and (3) intergovernmental agreement.<sup>11</sup> Like Wallace, these are perhaps more composite categories referring to a variety of features—actors, institutions, instruments and styles of policy-making—rather than purely abstracted rationalities of governance.

The extrapolation of different modes of governance is useful in seeking to give a more differentiated account of E.U. governance. Although appropriate for comparison between such “modes,” this approach may, however, struggle to clarify the governing features of any given mode, like the OMC, beyond certain stylised features. Moreover, it may produce a different sort of problem, namely, an inevitable tendency to treat particular instruments or tools as singularly synonymous with a particular mode. In other words, that the manifestation of the mode collapses into and becomes identifiable with one type of instrument—e.g. legislation as governance by hierarchy and OMC as governance by coordination. This excludes the possibility that an instrument may be motivated by multiple complementary or contradictory governance modes.<sup>12</sup> It is important to keep issues of instrument and tools, and modes or techniques, of governance distinct because it is apparent that there can be the emergence of something new as an instrument but which, nonetheless, remains largely consistent with prevailing modes or techniques of governance. Alternatively, another mode of governance may become dominant, which may either be pursued by modifying the application of traditional governing instruments or by the creation of a new instrument as the archetype of the means of achieving the governance mode. In short, we need to keep separate these two levels in order to make sense of what may be new, even if we also accept the inevitable interaction between the levels.

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<sup>8</sup> S. Bulmer and S. Padgett. (2004) ‘Policy transfer in the European Union: An institutionalist perspective’, *British Journal of Political Science*, 35:1, 103–126.

<sup>9</sup> C. Scott, ‘The Governance of the European Union: The Potential for Multi-Level Control’ (2002) *European Law Journal* 8:1, 59-79; J. Newman, *Modernising Governance: New Labour, Policy and Society* (London: Sage, 2001).

<sup>10</sup> H. Wallace, ‘An Institutional Anatomy and Five Policy Modes’ in H. Wallace, W. Wallace and M. Pollack (eds.) *Policy-Making in the European Union* (Oxford: Oxford University Press, 2005), pp. 49-90.

<sup>11</sup> F. Scharpf, ‘Legitimate Diversity: The New Challenge of European Integration’ in T. Börzel and R. Cichowski (eds.) *The State of the Union: Law, Politics and Society*, (Oxford: Oxford University Press, 2003), pp. 79-104.

<sup>12</sup> See e.g. Hervey and Trubek’s suggestion of a ‘transformative directive’ on healthcare in this issue.

### **II.1.5 Theme Five: Governance Attributes**

The most useful and well-known example of an attempt to articulate “new governance” by reference to specific attributes can be found in Scott and Trubek’s typology.<sup>13</sup> They identify the following key attributes of new governance: participation and power-sharing; multi-level interaction; diversity and decentralization; deliberation; flexibility and revisability; and experimentation and knowledge-creation. Other related attributes such, as “learning,” might also be added to the list of “new governance” characteristics. These attributes may be used in three different ways: to indicate a claimed state of affairs in relation to tools such as the OMC (‘OMC does embody these attributes’); to empirically investigate whether those attributes are present (‘Does OMC embody these attributes?’); or to normatively claim that possession of these attributes is a state to which instruments should aspire (‘OMC should aspire to embody these attributes’). One problem with “new governance” scholarship is the unacknowledged slippage between these modes of analysis. Moreover, often when scholars refer to “soft law,” it operates as a synonym for those parts of law that contain the attributes considered significant for identification of a governance technique as “new governance,” which leads to a conceptual conflation between the law and governance characterisations.<sup>14</sup>

### **II.1.6 Theme Six: Governance Architecture**

A final way of thinking about “new governance” lies in the metaphor of governance “architecture.”<sup>15</sup> While an approach based on attributes is more open to the types of instruments that might claim to be “new governance” instruments, the architectural metaphor implies something more prescriptive and constraining: it specifies particular elements of a governance methodology—e.g. benchmarking, peer-review—as a means for both identifying a shift in underlying governance patterns and as a template for the design of instruments. However, and similar to problems associated with “attributes” it is not always clear whether the “architecture” represents an ideal-type against which to judge any particular candidate instrument, or whether particular instruments are considered as necessarily being “new governance” instruments because of the presence of one or more elements of the prescribed methodology. This last point becomes important when we compare different OMC processes, and when we consider changes in these processes over time.

## **II.2 The Governance Turn: An Empirical Reading**

As Caporaso suggested,<sup>16</sup> E.U. integration studies moved into a post-ontological phase characterized by a decreased preoccupation with how to explain how European integration came about, and more focused on making sense of the resulting political and legal systems. Consistent with the change in the focus of analysis, one way in which the themes discussed above may be combined is to give the governance “turn” a largely empirical reading, signified by an analytical focus on the forms, processes, and outputs of governing. We would suggest that

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<sup>13</sup> J. Scott and D.M. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, (2002) *European Law Journal* 8:?, 1-18.

<sup>14</sup> See, as a good illustration, the Trubeks’ paper above at n.6 in which they state, “Note that “new governance” as defined in this paper includes what others and we have sometimes called “soft law”.”

<sup>15</sup> J. Zeitlin and C.F. Sabel, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the European Union’ (June 2006).

<sup>16</sup> J.A. Caporaso, ‘The European Union and Forms of State: Westphalian, Regulatory or Post-Modern’ (1996) *Journal of Common Market Studies* 34:1, 29-52.

this reading of the governance “turn” is largely a manifestation of the “institutionalist turn” in European integration studies.<sup>17</sup>

Kohler-Koch and Rittberger trace the “institutionalist turn” to the development of the Single European Market (SEM) programme in the mid-1980s.<sup>18</sup> A paradox becomes immediately apparent when we consider that this program was essentially concerned with the adoption of more than two hundred legislative instruments. In this way, the governance or institutionalist “turn” can be associated both with instruments that some might consider as old governance and “hard” law, as well as with newer manifestations, such as E.U. social dialogue or the OMC. There is, therefore, an apparent lack of differentiation in the sorts of instruments which may be considered as phenomenologically related to this governance “turn.” A solution may be to distinguish between instruments and modes—with the SEM, in Wallace’s terms, representing a shift in governance mode to regulatory policy-making—and to seek a change at this level. However, this mapping and categorization approach, typical of an empirical analysis of governance, often fails to adequately unpack the relationship between instruments and modes of governing. Indeed, there exists a tension between the characterization of techniques like the OMC as “being unlike” other techniques of governing—a distancing and contrasting strategy—and a view of the OMC as a “like-but-lite” version of existing governance modes—e.g. does it aspire to the sort of policy convergence which is otherwise achieved through harmonisation but by less coercive means?

Clearly, there is much that we welcome with an empirical approach when attempting to make sense of the OMC. Indeed, some of the most interesting literature on the OMC has arisen from projects devoted to the “OMC in action.”<sup>19</sup> However, problems arise when the empirical approach is utilised to compare the OMC to other governance techniques or modes, as it often creates a singular, static identity for different forms of policy coordination brought within the “legitimizing discourse”<sup>20</sup> of the OMC. While we would not quibble with the idea that there is such a thing as open policy coordination—a form of policy coordination undertaken by E.U. institutions in an attempt to stimulate and systematize processes for domestic policy-problem identification and problem-solving—the use of explicit or implicit contrasts has reinforced a coherence and unity of the OMC which may be lacking or may change over time. At best, what is produced is a stylized or simplified set of attributes for OMC or, at worst, misconceptions and mischaracterisations. Although sufficiently differentiated characterisations of different governance techniques reduces the tendency towards simplification, conversely, binary comparisons and contrasts run the risk of being over-inclusive and under-explanatory.

That is not to say that the literature on OMC exclusively seeks to characterize it by comparison with different governance techniques. Architectural empirical approaches have, in par-

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<sup>17</sup> See M. Aspinwall and G. Schneider, ‘Same menu, separate tables: The institutionalist turn in political science and the study of European integration’ (2000) *European Journal of Political Research* 38:1, 1-36. The institutionalist turn had both rationalist and historical/sociological variants. When applied to the study of new governance this might lead analysis in somewhat different directions: for rationalists the issue may be primarily one of explaining the choice of political actors to adopt one form of governance technique over another; for historical institutionalists the question of ‘choice’ of instruments may be problematised by reference to issues of ‘path-dependency’ while for sociological institutionalists, the concern may lie in explaining how actors engage with different forms of governance.

<sup>18</sup> Above n.2. See also S. Bulmer, ‘The New Governance of the European Union: A new institutionalist approach’ (1994) *Journal of Public Policy* 13:?, 351-380; K. Armstrong and S. Bulmer, *The Governance of the Single European Market* (Manchester: Manchester University Press, 1998).

<sup>19</sup> See Zeitlin and Pochet (eds.) above n. 1.

<sup>20</sup> See Radaelli above n. 1.

ticular, been useful in distinguishing the distinctive features of OMC as a mode of governance per se. Laffan and Shaw carry out the most developed analysis:<sup>21</sup> they carry out a sophisticated unpacking of the architectural design elements of OMC, in which they distinguish between OMC as a mode of governance and any given instantiation of an OMC process. This approach allows them to highlight the affinities and diversities between different OMC processes. They note that both EES and OMC inclusion share the characteristics of having a strong treaty base,<sup>22</sup> no Community budgetary leverage, and no European Court of Justice (ECJ) involvement. They also point out that both share certain characteristics: common objectives; indicators; best practice; a Community action program; National Action Plans (NAPs); national strategies; and peer-review processes. Equally, they indicate differences between the two processes. While NAPs are produced annually under the EES, this is not true under the OMC Inclusion. E.U. targets are more widespread in the EES than in the OMC Inclusion. Finally, Recommendations can be issued to Member States under the EES but not under the OMC Inclusion.<sup>23</sup>

However, there are two limitations and one danger with this kind of analysis. The first limitation, which they recognize, is that its empirical richness does not translate into a more sophisticated way of distinguishing between OMC and other modes of governance: “a priori definitions of new modes of governance provide a rough template for classifying OMC but their usefulness breaks down when applied across all instances of OMC.”<sup>24</sup> Hence, in its analysis of OMC as mode, it reverts back to explicit and implicit contrasts.<sup>25</sup> A second limitation is that while unpacking elements of OMC is in many ways useful for comparison *across* OMC processes, it is of considerably less utility in indicating change *within* OMC processes over time. Lastly, the danger is that OMC processes with a richer array of architectural features will automatically be identified as being more effective than those with fewer. Consequently, the EES will be viewed as the most effective or strongest OMC,<sup>26</sup> followed by social inclusion and so on. Though it is entirely correct to note a proliferation of features as indicating a “sliding scale of political commitment at European level,” it is quite another to observe that the absence of indicators in, for example, OMC Youth—unlike the strong OMCs in Employment and Social Inclusion—means that it does not guarantee “real world coordination at domestic level.”<sup>27</sup> While it may be the case that more features leads to greater effectiveness, this is a hypothesis to be tested, not a result to be assumed.

### II.3 The Governance Turn: A Normative Reading

A second reading of the governance “turn” can be interpreted as a desire to understand the significance of diversification of various forms of governance. This approach travels some distance with the empirical approach in investigating why “new governance” is emerging—

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<sup>21</sup> B. Laffan and C. Shaw, ‘Classifying and Mapping OMC in Different Policy Areas’ (New Gov 02/D09, 2005, 36pp): [http://www.eu-newgov.org/database/DELIV/D02D09\\_Classifying\\_and\\_Mapping\\_OMC.pdf](http://www.eu-newgov.org/database/DELIV/D02D09_Classifying_and_Mapping_OMC.pdf)

<sup>22</sup> While it is true that the inclusion process is a means of taking forward a treaty-based shared commitment by the EU and Member States to combat social exclusion, it is worth stating that unlike the EES the OMC process on social inclusion is not laid down in the E.C. Treaty itself.

<sup>23</sup> Above n. 21, pp 13-14. Note that key aspects of this descriptive analysis are contested in Part III of the Article..

<sup>24</sup> Above n. 21, p.6.

<sup>25</sup> E.g. OMC is the “soft mode of governance par excellence”, p.6.

<sup>26</sup> Or if EMU coordination is counted within OMC then the EES will be the second strongest and so on.

<sup>27</sup> Above n. 21, p.15.

the background conditions that are creating a shift from “government to governance”—but it also seeks to push beyond into considerations of the quality of governance that is, could, or ought to be produced. If the SEM program marked the beginning of the governance “turn,” then the European Commission’s White Paper on Governance is equally emblematic of a debate about the normative quality of European governance.<sup>28</sup> And within the academic community, publications such as Joerges and Dehousse’s edited volume, *Good Governance in Europe’s Integrated Market*,<sup>29</sup> were indicative of attempts to combine studies of particular techniques—such as comitology or administrative agencies—with considerations as to the normative potential of these techniques to advance constitutional and democratic values.

As with the empirical approach, important and valuable lines of enquiry have been opened by connecting changing patterns of governance to contemporary debates about European constitutionalism and democracy. Nevertheless, we wish to highlight certain concerns. The first is that an approach based either on “attributes” or “architecture” runs the risk of conflating an “ideal” form of “new governance” with any given variety of governance; this is the danger of treating any given OMC process as necessarily possessing the attributes or architecture of new governance (a point we develop more fully in the case-studies in Part III). Secondly, there is a sense that the attributes and architecture associated with “new governance” are seen as better than, and quite separate from, those associated with old governance.<sup>30</sup> Whereas the future is bright with new governance, the attributes and designs of old governance are depicted as old-fashioned and redundant. This tends to impede reconciliation between the on-going relevance of traditional patterns of governance and those of the new. Thirdly, the failure to keep distinct actual forms of governance and the ideal normative vision of good governance often leads to dramatic shifts in optimism and pessimism as to the value of new governance. The case of comitology is instructive. While for the optimist it represented a viable means of bringing deliberation into risk regulation, for the pessimist, examples such as the BSE crisis indicated the failure of comitology to deliver on its promise of effective and legitimate governance. Similarly, there is an increasing disjuncture between the proponents of the OMC who see value in either its attributes or architecture, and those who tend to view it as symbolic politics, cheap talk, or simply ineffective in producing domestic policy change.

This is illustrated further by the normative architectural definitions of “new governance”. The blueprint for experimentalist “new governance” architecture is a governance structure which involves framework goals, reporting, peer-review, and self-revising and recursive redefinition of means and ends.<sup>31</sup> For Zeitlin and Sabel, all of E.U. governance is now being driven by this underlying architecture.<sup>32</sup> It is particularly apt to describe and characterize OMC as an example of “new governance” architecture. Indeed, OMC seems to be a “new governance” architects dream design come to life: “[t]he recursive properties of the EU’s new experimentalist governance are displayed most clearly in the family of processes known as the Open Method of Coordination.”<sup>33</sup> However, this is also the major potential disadvantage of architectural “new governance” approaches. The need to emphasize the ubiquity of the architecture means

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<sup>28</sup> European Commission, *European Governance – A White Paper* COM(2001) 428 final.

<sup>29</sup> C. Joerges and R. Dehousse (eds), *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2002).

<sup>30</sup> See N. Walker, ‘EU Constitutionalism and New Governance’ in G. de Búrca and J. Scott (eds) *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006) at 29-30.

<sup>31</sup> Zeitlin/Sabel above n.15.

<sup>32</sup> *Ibid.*, p.3.

<sup>33</sup> *Ibid.*, p.27.

that important changes within OMC processes, the reasons for those changes, and differences between OMC processes are lost. Moreover, it sheds little light on the difference between the OMC as a candidate “new governance” instrument, and any other potential candidate “new governance” instrument. In short, too much of the architectural diversity within and between OMC instruments and between the OMC and other instruments is suppressed in favor of an upbeat narrative celebrating the advent of the era of “new governance”.

### III. The OMC as “Soft Law”

When scholars—both lawyers and political scientists—have engaged with the creation of the OMC, they have commonly done so by contrasting the “hard” law of instruments, especially Directives, created under the Classic Community Method, with “soft” law represented by governance mechanisms such as the OMC.<sup>34</sup> This implies that a governance technique such as the OMC embodies some legal attributes or values, but that it is also unlike what we commonly consider to be law in some important ways.

The invocation of the distinction between “hard” and “soft” is necessarily to presuppose the presence of law in contrast to those accounts of the OMC which treat it as purely political.<sup>35</sup> This has the advantage of putting “law” and legal enquiry into the framework of analysis, thereby contributing to the multi-disciplinary assessment of OMC. Nonetheless, any potential conceptual gain, achieved in bringing law in, may be lost depending upon how law is rendered in the analysis. One way is simply to treat the categories of “hard” and “soft” law as dichotomous: an instrument is either manifestly “hard” law or “soft” law. This leads to a tendency towards definition by default—that which is evidently not “hard” law must by default be “soft” law<sup>36</sup>—and use of signifiers of hard law—treaties and legislation—rather than clearer theorisation of what it means to be law in order to identify “harder” and “softer” variants. To a certain extent, this empirical approach makes some sense when lawyers think of the sorts of instruments they tend to treat as manifestations of “soft” law: (1) instruments that have been negotiated as if they would become formal legal instruments, but which are not ultimately adopted as such; (2) instruments drafted so that they could be adopted as binding instruments at some point in the future; (3) instruments which are negotiated through formal rule-making procedures even though there is no intention that they are adopted as formal legal instruments; and (4) documents which do not adopt the form of accepted legal instruments but which mimic the language and normativity of formal legal instruments. This is the familiar terrain of “soft” law: it identifies “hard” law in terms of formal processes for adopting meas-

<sup>34</sup> See, for instance, J. Kenner, ‘The EC Employment Title and the ‘Third Way’: making soft law work?’ (1999) IJCLIR 48; S. Klosse, ‘The European Employment Strategy: Which Way Forward?’, (2005) IJCLIR 1 at 8; S. de la Rosa, ‘The Open Method of in the new Member States – the Perspectives for its use as a Tool of Soft Law’, 11 ELJ (2005) 618; D. Ashiagbor, ‘“Soft Law”, new governance and the Employment Strategy’, Chapter 5 in id, *The European Employment Strategy: Labour Market Regulation and New Governance* (OUP, 2005); E. Szyszczak, ‘Experimental Governance: The Open Method of Coordination’ 12 ELJ (2006) 486 at 495; L. Barani, ‘Hard and Soft Law in the European union: The Case of Social Policy and the Open Method of Coordination’ ConWEB No. 2/2006 (<http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/Research/PaperSeries/ConWEBPapers/>).

<sup>35</sup> “By seeing soft and hard law as part of a single continuum, any soft policy coordination is seen as operating within a legal framework. The open method as articulated and conceived of in Lisbon is seen as firmly within the realm of soft law”: I. Maher, ‘Law and the Open Method of Coordination: Towards a New flexibility in European Policy-Making’ (2004) *Zeitschrift für Staats- und Europawissenschaften* 2:2, 248-262.

<sup>36</sup> This is analogous to the view of “new governance” as “not-old-governance”.

ures considered to be binding law, and then considers all examples of instruments which are law-like—but law-lite—as “soft” law.

This approach is problematic for a number of reasons. First, it relies on a highly formalistic and positivistic account of law that legal theory has increasingly problematized. Second, it places its emphasis strongly on the legal text—the treaty or directive—and the treaty-making or legislative process as the signifier of law, while ignoring the importance of adjudication and judicial review as legal techniques. Third, it risks treating everything that is not easily or formally identifiable as “hard law” as an undifferentiated mass of “soft law.” Accordingly, Borrás and Jacobsson usefully attempt to distinguish between different forms of “soft” law, contrasting the OMC with more traditional forms of “soft” law.<sup>37</sup> However, in their contrast of the OMC with previous forms of soft law, and their conclusion that the OMC is based on “voluntarism, subsidiarity, flexibility, participation, policy integration, and multi-level integration,” it appears that it is the apparent attributes of “new governance,” rather than any change in the quality of law, that drives the distinction between more recent manifestations of “soft” law and its earlier forms: the categories of “soft” law and “new governance” are conflated, producing, in other accounts, the muddled identity of “soft governance.” Indeed, one major benefit of Zeitlin and Sabel’s architectural account is that it takes a step outside the hard/soft law binary: “the new architecture of EU governance is not “soft law”, but neither it is traditional “hard law” of a form that grows out of and is reducible to principal-agent rule making”.<sup>38</sup>

A move, beyond categorizing a technique of governance as simply “hard” or “soft,” must be made in order to give the framework anything but an absolutely minimal explanatory purchase. This suggests more of a spectrum of possibilities: a focus on looking for legalization or de-legalization; the “hardening” or “softening” of particular governance instruments; or as a move towards “hard” or “soft” law. More precisely, it will involve examining the extent to which the OMC, in its evolution, acquires characteristics which make its rules of conduct look more or less like the typical characteristics associated with “hard” law.

Perhaps the most extensive, and certainly influential, attempt to calibrate legalization is the sliding scale of legalization, provided by Abbott, Keohane, Moravcsik, Slaughter, and Snidal.<sup>39</sup> Their scale of legalization is a composite one comprised of three dimensions of “Obligation,” “Precision,” and “Delegation.”<sup>40</sup> Each attribute presents itself as strong, moderate, or weak in any given instrument, and thus, it is claimed, movements from “hard” to “soft” law may be calibrated and mapped. Nonetheless, while the turn towards a continuum from “hard” to “soft” law has an obvious appeal, it is also problematic for a number of reasons. First, the attributes of law—obligation, precision, and delegation—are selected because they represent a

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<sup>37</sup> Above n.1.

<sup>38</sup> Above n.15.

<sup>39</sup> K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter, and D. Snidal, ‘The Concept of Legalization’ (2000) *International Organization* 54:3, 401-19.

<sup>40</sup> Defined as follows: *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behaviour thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret and apply the rules; to resolve disputes; and (possibly) to make further rules. The inclusion of the dimension of ‘delegation’ brings in an institutional dimension –the dispute-settlement role of courts and tribunals– more squarely into the picture than may be apparent in other accounts which simply look to the process of rule-promulgation. *Ibid* at p. 401.

particular rationalist ideal-view of how to conduct international relations through law. Not surprisingly, the emergence of techniques like the OMC can be interpreted as having the mirror-image vices of the virtues associated with the conduct of Member States' relations based on "hard" law.<sup>41</sup> However, it is important to keep distinct the question of what is "law" from the question of what would be the ideal form and quantity of law for the conduct of international relations. It is evident, as Trubek, Cottrell, and Nance indicate,<sup>42</sup> that the rationalist account of how to conduct these relations may differ from accounts offered by constructivist or sociological perspectives on law and international relations. In this way, the selection of the attributes of "obligation", "precision" and "delegation" require to be understood as a particular reading of the relationship between law and international relations rather than as a definition of "law" itself.

Second, what appears as a continuum of law may in practice struggle to escape from a more binary "hard"/"soft" law approach. Little appears to turn on the relative weakness of "soft" law once one moves away from the paradigmatic "hard" law position in which each of the attributes of obligation, precision, and delegation are at their strongest. This gives us surprisingly little basis for which to distinguish between different forms of "soft" law, and instead of working on a continuum, re-emphasises a contrast between "hard" and "soft" law.

Third, this approach often views "soft" law as a second-best strategy: the ideal would be something "harder" but practical exigencies dictate something "softer." In this way, "soft" law is better than non-law, but less satisfactory than something "harder." This leaves no room for considering "soft" law as a strategy in its own right: it can only be defined as a departure from "hard" law. This, again, returns us to the near impossibility of distinguishing different forms of "soft" law.

Fourth, arguably the three attributes are not necessarily equally weighted. Given the typical weakness of obligation and third-party dispute resolution, especially by courts, in relation to "soft" law instruments, particular emphasis is placed on the importance of the precision criterion as a means of calibrating the legalization of "soft" law instruments. Precision is presented on a sliding scale: at its weakest, as one moves down the discretion scale it becomes impossible to determine whether conduct complies with the law; and at its strongest, one encounters determinate rules which leave only narrow issues of interpretation. While this strategy has some value when considering forms of "soft" law that appear to be like "hard" law, it is more difficult to applying this to something like the OMC because there is no single text to use as a reference. This point is well made by Laffan and Shaw, who indicate the methodological difficulties in categorizing and comparing OMC processes when one cannot easily utilize traditional techniques, like resorting to databases—such as CELEX or PreLex—as a means of locating appropriate reference materials.<sup>43</sup>

Last, understanding the myriad forms of governance on a continuum from "hard" to "soft" law—while "bringing law in"—simply assumes that all instruments operate on a continuum

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<sup>41</sup> Indeed for some, this shift to "soft" law not only represents a weakening of the ideal conditions for the conduct of international relations, but also results in studies of "new modes of governance" that are little more than "fashionable red herrings" distracting attention from the legalization and judicialization apparent in other policy spheres: T. Idema and R. Daniel Kelemen, 'New Modes of governance, the Open Method of Coordination and other Fashionable Red Herrings' (2006), *Perspectives on European Politics and Society* 7:1, 108-123.

<sup>42</sup> "'Soft Law', 'Hard Law' and EU Integration' in G. de Búrca and J. Scott (eds) *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006) 65-94.

<sup>43</sup> Above n.21.

of law: there is no non-law option. Thus, recent studies on “hybridity”, while moving beyond a view of governance as either characterised by “hard” or “soft” law—usefully suggesting a variety of interactions between instruments—nonetheless, presuppose that the instruments they discuss, including the OMC, are forms of law of some sort.<sup>44</sup> Yet, for some, the OMC is a non-legal form of intervention, symbolic politics or cheap talk, rather than a “soft” law one. Simply treating OMC as a form of “soft” law at the “softest” end of the scale, neatly side-steps the important but intensely difficult issue of identifying when forms of normative ordering that produce, in Snyder’s terms, “practical effects”<sup>45</sup> can be considered as law in the absence of formal signifiers of law.

The approach of political scientists to OMC and “soft” law has generally been to see the former as a species of the latter, but with the emphasis lying more on explanations for why political actors have resorted to these governance techniques and upon hypothesizing their potential effects, rather than on the deployment of “soft” law as an analytical category. Nevertheless, the “hard”/“soft” distinction does play an important role in situating OMC in relation to other governance techniques when considering its potential for “Europeanisation.” Citi and Rhodes, for example, suggest that policy convergence capacity is highest with regards to “legally binding regulations,” weakening successively from “legally binding policy objectives,” down to “simple benchmarking and/or recommendations.”<sup>46</sup> There is an implicit shift from “hard” law to “soft” law with a correlative causal diminution in convergence capacity. Similarly, Bulmer and Padgett hypothesize that movements from governance by “hierarchy” associated with binding law, to governance by “facilitated coordination”, results in a diminution in the extent of policy transfer.<sup>47</sup> Again, this can be seen as implicitly suggesting that movements from “hard” law to “soft” law result in weakening practical effects. Once more, this requires empirical substantiation and promotes a highly contestable view of normative effectiveness.

The dominant frameworks of “old-new” governance and “hard-soft” law are analytically much more problematic than their near-constant deployment in prevailing analyses of the OMC would suggest. To be sure, the scale of the problems are not uniform. At worst, the OMC is rendered up as a caricature of what it is not. At best, the most sophisticated lines of enquiry point toward, but sometimes under-specify, what they seek to explain. If there are inherent difficulties with these dominant frameworks, they become particularly more apparent when seeking not only to characterize or compare OMC processes, but also when seeking to explain changes within such processes over time. Although it may be argued that these forms of categorization are not intended to explain change per se, nonetheless, the idea of a shift from “hard” law to “soft” law, and towards new modes of governance, does indeed suggest a narrative of change. However, it is a change typically characterized by a movement from one state of affairs to another: a comparative-statics approach. This makes it difficult to capture the nature of any given governance process without the prop of comparison to another type of process; renders differences between similar processes hard to capture, and leaves un-

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<sup>44</sup> See Maher above, n. 35 and Barani above n. 34; C. Kilpatrick, ‘New EU Employment Governance and Constitutionalism’ in G. de Búrca and J. Scott (eds) *Law and New Governance in the EU and the US* (Hart, 2006) 121.

<sup>45</sup> F.G. Snyder, ‘Soft Law and Institutional Politics in the European Community’ in S. Martin (ed.) *The Construction of Europe: Essays in Honour of Emile Noel* (Deventer: Kluwer, 1994) 197-225 at 198.

<sup>46</sup> M. Citi and M. Rhodes, ‘New Modes of Governance in the EU: Common Objectives versus National Preferences’ (EUROGOV) N-07-01, <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-01.pdf>

<sup>47</sup> Above n.8.

illuminated change in any given process over time. The case-studies that follow expand on these claims.

## **IV. The Conceptual Frameworks Applied to OMC**

### **IV.1 The Changing European Employment Strategy**

The changing EES is a challenge to both the “new governance” and “soft” law frameworks. Its development suggests that, in order to strengthen the EES, Community institutions seem to have, in recent successive revisions, made it less new (according to many of the NG frameworks), and softer or weaker (according to the “hard” or “soft” law paradigm). More broadly, in many respects the changes to the EES often appear to occur in a parallel universe to the frameworks which have been used to describe it.

Both the appeal and the subsequent difficulties of applying the law-like and NG frameworks to the EES can best be understood when we examine distinctive phases in its development. Three different phases in the development of the EES can be identified. Although the first phase can, with at least some degree of satisfactory fit, be explained within both the “hard” or “soft” law and “new governance” frameworks, the two subsequent phases present severe explanatory difficulties for both of these approaches. It is our view that a convincing theory of the EES should be able to capture these changes. As we examine these phases, we will also track one particular example, the treatment of age and older workers in the EES, in order more concretely to illustrate the analysis.

#### **IV.1.1 Phase One of the EES: Amsterdam, Luxembourg, Lisbon, and Stockholm**

In the first six years of the treaty-based EES<sup>48</sup> (1997-2002), the yearly reiteration of the Employment Guidelines envisaged by the Treaty reflected reality. In this phase, the Guidelines were organized around the four pillars of employability, entrepreneurship, adaptability, and equal opportunities (the latter primarily between women and men). Horizontal objectives were added to the design in both 2001 and 2002. As a result of these cumulative elaborations, 2002, the final year in this phase, was the bumper year for the Employment Guidelines to date: it is when they were at their biggest and, on paper at least, their most demanding. In this year, in addition to an extensively elaborated set of Guidelines, there were no fewer than six horizontal objectives<sup>49</sup> which included national targets on employment rates for men, women, and older workers, as well as indicators to measure, for instance, quality at work.

The EES had four distinctive characteristics in this phase. The first was active and ongoing reflection and amendment of E.U. normative statements on employment governance to the Member States. The second was extensive amplification of the sphere of E.U. employment

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<sup>48</sup> Nor should we forget the pre-Treaty life of the EES, and indeed its origins, in the ‘Essen phase’ between December 1994 and 1997. During this pre-Treaty phase the EES travelled very little distance along the legalization road nor did it display many of the features considered important by NG frameworks. It set five broad objectives for the Member States (to develop human resources through vocational training, promote productive investments through moderate wage policies, improve efficiency of labor market institutions, identify new sources of jobs through local initiatives and to promote access to work for some specific target groups such as young people, the long-term unemployed and women). From 1995 Member States were invited by the European Council to submit Multi-Annual Employment Programs on the realisation of the Essen priorities into their national policies.

<sup>49</sup> (A) Enhancing job opportunities (incorporating the employment rate targets for men, women and older workers); (B) quality in work; (C) life-long learning; (D) social partner involvement; (E) respect for all four pillars and the horizontal objectives; (F) strengthening the development of indicators and benchmarks.

activity (more issues were identified and covered by each successive round of Employment Guidelines). The third was complementarity of the objectives to be pursued by E.U. employment governance tools, particularly between E.U. legislation and the EES.<sup>50</sup> This has the potential to provide strong and mutual indirect support between E.U. governance instruments: a good example is the simultaneous and textually cross-referenced appearance of a directive outlawing age discrimination and an extensive elaboration of guidelines and targets on this matter in the EES. The fourth was increasing normativity of the EES over time. This can be seen in the increasing precision of the employment guidelines, the content of the recommendations issued to individual Member States, and the proliferation of quantitative targets to be met by each Member State.

The treatment of age provides a good illustration. In the 1998 and 1999 Employment Guidelines, older workers were not mentioned at all. In 2000, a Directive prohibiting age discrimination<sup>51</sup> was passed which extracts Conclusions of the European Council stressing the need to develop a labor market supporting and integrating older workers. This was matched by a new Employment Guideline in the 2000 Guidelines within the pillar of employability which asked the Member States “to develop a policy for active aging, so that older workers are also able to remain and participate actively in working life.” The EES focus on age was progressively elaborated from its initial appearance in 2000. In 2002, the EES contained a target—added by the Stockholm European Council in March 2001—national employment rate of 50% for older persons, aged 55-64. The 2002 Employment Guidelines also contained a substantially beefed-up Guideline: Guideline number three, which was devoted to active aging, called upon Member States *inter alia* to introduce measures to maintain the working capacity and skills of older workers, providing flexible working arrangements—such as part-time work for older workers—and reviewing tax and benefit systems so as to reduce disincentives for older worker labour market participation.

Readings of the first phase can be made which, to some degree, fit comfortably within both the “new governance” and the “legalization” framework. For instance, in relation to “new governance” attributes, the instantiation of peer-review beckons deliberation; the need to put together annual NAPs in each Member State institutes multi-level integration, while the substantial annual changes to the content of the EES and design innovations within the EES such as the addition of cross-cutting horizontal objectives signal experimentation, flexibility, and revisability and knowledge creation. As for architectural variants of new governance, Article 128 EC Treaty looked like the first bona fide consecration of experimental architecture in the European Union. It expressly requires Employment Guidelines to be drawn up by the Council on the basis of European Council Conclusions which are, in turn, to be based on a joint report from the Council and the Commission. It then requires Member States to report on their progress in realizing these guidelines and, after E.U.-level examination of their reports, gives the Council the power, on the basis of a Commission recommendation, to issue recommendations to individual Member States. This annual examination of Member State progress then forms the basis of the succeeding year’s joint report by Commission and Council to the European Council. It seems unsurprising that the EES was seized upon by “new governance” scholars.

In relation to legalization and the Treaty framework, the power to issue recommendations may be viewed as providing muscle to the “obligation” and “delegation” dimensions, as delegation includes not just third-party dispute resolution, but also the power to issue further

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<sup>50</sup> See further Kilpatrick above n.43.

<sup>51</sup> Directive 2000/78/EC

rules.<sup>52</sup> Targets, guidelines, and indicators can be seen within a “hard” or “soft” law frame as “rule-like” features of the EES, measured according to their quantity and precision. Additionally, Guidelines can be made more probing and more precise by use of the power in the EES to issue Recommendations to specific Member States. From this perspective, large strides were made year-on-year in relation to the “precision” dimension. All these features became quantitatively more important over the lifetime of this first phase: there were more targets, guidelines, and indicators, and the Council used its power to issue Recommendations once the Amsterdam Treaty entered into force in 1999. Qualitatively, as the example of age illustrates, the language and tools became increasingly constraining with each passing year.

Yet, even in this phase, questions can be asked about the capacity of these two frameworks in giving more than the most preliminary of useful assessments concerning the EES. In particular, there are issues of which parts of the EES one should focus on in order to make an assessment. There are also issues of what is considered more significant: is it *more* “new governance” or, within the legalization framework, “hardening,” or *better*, “new governance” or “rule” content? How is either of these to be measured? For example, let’s examine the power to issue Recommendations, a quality expressly possessed outside the EES only in the area of macroeconomic governance. These were issued twice in Phase One, in 2000 and 2001, following entry into force of the Amsterdam Treaty in mid-1999. Should we focus on whether the total number issued increased, on whether the numbers issued to specific Member States altered, on whether the scope of their content increased, varied, or became more prescriptive? Or should we focus on whether the Recommendations are tightly related, and in what ways, to other parts of the EES process, such as the National Action Plans? It is not clear that the various governance or legalization frameworks help us much in making these decisions, or at least that, despite their ubiquitous utilization, they have been elaborated in a way which might help us to do so.

Moreover, the often underlying assumption is that the more “newness” (in the case of “new governance” frameworks) or “hardness” (in the legalization framework), the more effective or potentially effective the EES shall be. Indeed, primarily as a result of its Phase One development, the EES is frequently viewed as the strongest OMC, and the flagship mode of new governance. Yet, not only have even the most avid seekers of evidence that the EES functions properly failed to identify evidence of it leading to a systematic step-change in how employment law and policy is discussed, decided, and executed in the European Union,<sup>53</sup> the Community institutions themselves moved to alter the Phase One design because it was perceived not to be working.

#### **IV.1.2 Phase Two of the EES: The Refocused EES in 2003 and 2004**

The design of the EES was substantially overhauled in 2003. The four pillars and the horizontal objectives were replaced by three overarching objectives—full employment, quality, and productivity at work; social inclusion; and cohesion—and ten specific Guidelines, half the number in Phase One.<sup>54</sup> The reasons informing this new design were equally significant. It was designed to counteract perceived problems in the first phase. In particular, the message drawn from the first phase was that over-iteration and amplification reduced the obligation-generating potential of the EES. The Commission’s Communication on “The Future of the

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<sup>52</sup> Above n.40.

<sup>53</sup> Zeitlin and Pochet, above n.1.

<sup>54</sup> In Phase 1 the number ranged between a minimum of 18 and a maximum of 22.

European Employment Strategy”<sup>55</sup> set out the problems it perceived with the first phase, and how they might be solved. The first was complexity: “[i]t is now widely considered that, after the successive revisions introduced since 1997, the Guidelines have become complex and that they should be simplified.”<sup>56</sup> The second involved the problems with iteration and the need for greater stability: “[e]xperience has shown that important labour market measures often take time to design, adopt and implement, and even longer to demonstrate their impact in the labour market. While the Treaty provides for annual guidelines, and exceptions could be made on justified grounds, changes should be avoided until the mid-term review planned in 2006.”<sup>57</sup> The third concerned the need for better governance: this was viewed as requiring participation from all levels of government for implementation, including regional and local level, and the active participation of the social partners at all stages.<sup>58</sup> The fourth was an increased focus on *results*: through more result-oriented guidelines and greater use of quantitative targets.<sup>59</sup> The fifth, and final, problem included a more tailored pressure on Member States through greater use of recommendations.

The new design in Phase Two resulting from this diagnosis, placed targets centre-stage, reduced the number of Guidelines to ten and rendered them more precise, imperative and determinative. Again, the treatment of age in the 2003 Guidelines illustrates this in an exemplary fashion. The fifty-percent employment target for older workers by 2010 was retained within the first overarching objective—full employment. The fifth “Specific Guideline” dealt with promoting active aging. This required Member States (“Member States will”) to promote active aging in a number of ways including flexible work options, the reform of early retirement schemes, and encouraging employers to employ older workers. But it also added a new target on aging: policies were to aim to achieve by 2010 an increase by five years, at E.U. level, of average exit age from the labor market, estimated at 59.9 in 2001 and 61 in 2006. By reason of the aims it pursued, it retained the potential for complementarity between the EES and employment protection legislation. How well-equipped are our two frameworks to deal with explaining the shift between the first and the second phase?

The stress in the second phase on partnership by inviting the social partners at national and E.U. level to implement the EES and report on it, could be interpreted as reflecting the “new governance” attributes of “participation and power-sharing”. However, the main problem for a “new governance” analysis of this second phase is demonstrated by, though not only by, a dramatic and deliberate turning-away from the iteration and revision which seems to be a central plank—in both architectural and attributional variants—of new governance’s attachment to OMC. Instead, stability, a word not normally associated with new governance attributes or architecture, is placed center-stage. Simplicity and clarity also do not seem to fit readily with the inventive and self-reproducing knowledge creation associated with the new governance reading of the EES. Equally important, the changes to the EES in this second phase cannot straightforwardly be described as being inwardly generated by the process itself. Instead, they are the outcome of a familiar governance pattern, in which a particular governance mode, here the EES, is subject to a periodic appraisal, assessment, and revision. Though this might be seen as reflexive governance, concerned with improving the input, process, and outputs of the

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<sup>55</sup> *The future of the European Employment Strategy: A strategy for full employment and better jobs for all* Brussels, 14.1.2003 COM(2003) 6 final

<sup>56</sup> *Ibid.*, 6.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, 8 and 16-18.

<sup>59</sup> *Ibid.*, 6.

EES, it is not, or not primarily, the distinctive, inwardly-generated reflexivity associated with new governance.

In relation to the legalization framework, it can be used to make sense of certain aspects of these changes. It can do this by taking a particular issue-based focus, illustrated by our example relating to the changing treatment of age, so that the changes instituted can be seen as a “hardening” of the EES. However, the overall changes in EES design in Phase Two are not at all easily rendered as a “hardening” or a “softening” of the EES or, indeed, by using the obligation, precision, or delegation continuum. Although the stability of the guidelines and targets could be seen as a “hardening” of the EES, rather quickly the explanatory traction of this framework is revealed to be slender and weak. It is clear that measuring the strength of the EES, even simply from the perspective of its designers, and leaving aside the distinct issue of effectiveness in practice, requires a much more elaborated, qualitative, and overall institutional design assessment than the “hard” or “soft” law framework can provide. To understand Phase Two, we need a framework in which, to give just a few examples, targets and guidelines can properly be contrasted as techniques, and in which reducing the number of guidelines can be understood as a strategy to enhance the EES. Indeed, the contrast between the first two phases shows the difficulties for those working within the legalization framework—in which more rule-like features, precision, or obligation, equates with “hardening” or “strengthening,” to comprehend or make sense of “hyperlegalization” in which so many normative instructions are given, that the governance tool as a whole loses precision as well as a reduced obligation-generating potential.

#### **IV.1.3 Phase Three of the EES: The 2005 Barroso Lisbon Re-launch**

Like Phase Two, the Barroso re-launch of the Lisbon process in Spring 2005 also emphasized the need for stability rather than reflective annual reiterations of the EES—hence, the new Guidelines are intended to last from 2005 to 2008, with updating strictly limited. However, it constituted a significant shift in both the objectives and the architecture of the EES from those previously pursued.

The third, and current phase, envisages a new focus on growth and jobs which is achieved by combining the Broad Economic Policy Guidelines (BEPGs) and the EES into twenty-four “Integrated Guidelines,” of which the last eight are Employment Guidelines. National Action Plans in different sector-areas, such as employment, have been replaced by National Reform Programs submitted by the Member States and a Joint Integrated Report prepared by the Council and the Commission. Two significant changes have occurred in relation to Recommendations. First, in 2006, for the first time, the power contained in Article 128(4) E.C. to issue Recommendations to specific Member States was not used. Second, in 2007, the Commission has proposed country-specific Recommendations, but these are, in line with the new integrated approach, to be combined macroeconomic and employment Recommendations.

In relation to the EES, five main characteristics can be identified in the Barroso phase. The first is a disappearance of a free-standing EES. The second is an attempt to abandon complementarity: with the new focus being placed much more strongly on more jobs than on better jobs, the connections between the current Employment Guidelines and broader employment protection initiatives are less obvious. The third characteristic is a dramatic restriction of the issues covered in the EES. This also includes how fully those issues remaining are covered. The fourth involves the fate of targets: these have almost all been relegated to an afterthought at the end of the Employment Guidelines, which indicates merely that these were some things agreed upon in the past. Last, a shift towards re-nationalization: it is up to each Member State, in its National Reform Program, to identify its own priorities and set its own targets which

will then be monitored at Community level. The Employment Guidelines constitute “a policy framework to focus action.”<sup>60</sup>

Hence, the only reference to active aging is now inside a much more generic Guideline 18 on ‘A Lifecycle approach to work’, by which Member States should “support . . . active ageing, including appropriate working conditions, improved (occupational) health status and adequate incentives to work and discouragement of early retirement.” In relation to targets, while the fifty-percent employment rate target for older workers is retained, in Integrated Guideline 17, the effective exit age target, along with all the other targets and benchmarks, except for those on employment rates, are placed at the end of Integrated Guidelines as a historical record. Interestingly, though perhaps inevitably, this new settlement has not effectively quenched the desire of other Community institutions to elaborate, or even deviate from, this new simplified design. For example, the European Council, in the 2006 Spring Summit, embellished the Integrated Guidelines with four new priority actions. One of these is increasing employment opportunities for priority categories and includes extensive references to younger and older workers.<sup>61</sup>

Hopefully, the inadequacy of the “hard” or “soft” law framework to capture these shifts is self-evident. In relation to new governance, even if evidence of these attributes can be found, does it not remain the case that focusing merely on new governance attributes fails adequately to explain some of the most significant developments in the EES? In relation to architectural definitions of new governance, at one level, the EES has always in some ways mirrored this architecture, in that it involves goals, reporting, and so forth. However, comparing the three phases shows how misleading formalistic categorizations, based on the treaty definition of the EES, or in an assumed continuity over time, can be in capturing its changing design—Phase Three, in particular, has moved itself considerably away from the description offered by Laffan and Shaw described above.<sup>62</sup> How then should one use the new governance analytical framework to describe or explain shifts in the architecture? There must be a risk that either these changes must be explained separately from the architectural frame, or if incorporated within it, characterized as unimportant. On another level, the EES has never mirrored the architecture because it has never sustainably delivered the recursive redefinition of its means and ends, which is a central part of the new governance architectural blueprint—does that mean the EES has never in any of its three phases constituted “new governance”? Further problems with a blanket classification of the OMC are compounded when we look at change in another OMC process: the Social Inclusion OMC.

## IV.2 The Changing Social Inclusion Process

The social inclusion OMC process<sup>63</sup> has been in operation since 2000 and has gone through three cycles. The first two cycles were based on a methodology that emerged with the Nice European Council’s endorsement of a set of common objectives for social inclusion. These

<sup>60</sup> Joint Employment Report 2005/6, p.5.

<sup>61</sup> Para 16, European Council Conclusions (Brussels, 7775/1/06 Rev 1).

<sup>62</sup> See above n.21.

<sup>63</sup> See K. Armstrong, ‘Tackling Social Exclusion Through OMC: Reshaping the Boundaries of EU Governance’ in R. Cichowski and T. Börzel (eds.), *The State of the European Union: Law, Politics and Society* (Vol. 6) (Oxford: Oxford University Press, 2003), pp.170-94; K. Armstrong, ‘How Open is the United Kingdom to the OMC Process on Social Inclusion’ in J. Zeitlin and P. Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Brussels: P.I.E. Peter Lang, 2005) pp. 287-310; M. Ferrera, M. Matsaganis and S. Sacchi, ‘Open Coordination against Poverty: the new “social inclusion process”’, *Journal of European Social Policy*, 12:3, 226-239;

were: (a) to facilitate participation in employment, and access by all to resources, rights, goods and services; (b) to prevent the risk of exclusion; (c) to help the most vulnerable; and (d) to mobilize all relevant bodies. On the basis of these objectives, the Member States submitted their first National Action Plans on Social Inclusion (NAPincl) in 2001 for the 2001-2003 term, and revised them in 2003 for the 2003-2005 term,<sup>64</sup> by which time a common set of social indicators had also been developed (known as the “Laeken indicators”). The third cycle, for 2006-2008, occurred following: (a) the mid-term review of the Lisbon Strategy;<sup>65</sup> (b) a decision to streamline the social inclusion process with pension and emergent healthcare OMC processes;<sup>66</sup> and (c) an evaluation of the social inclusion process after the first five years of its operation.<sup>67</sup> This third cycle, therefore, represented a modification of the OMC methodology.

In this case-study we advance the discussion made in our study of the EES in two ways: first, by analyzing the features of the social inclusion OMC process and by comparing it with the EES we have a means of testing how well the “new governance” and “hard”/“soft” law frameworks capture the nature of the inclusion process and the elements of difference between it and the EES; and second, in considering the evolution of the social inclusion process from its initial phase of development to the emergence of an umbrella “Social Protection and Social Inclusion” process, we also have a further means of exploring how well these explanatory frameworks describe change within any given OMC process.

#### **IV.2.1 Phase One: The First Two Cycles of the OMC**

The methodology for coordination of Member States’ policies and strategies to tackle poverty and social exclusion, was modeled on the EES, particularly in terms of the creation of a set of common objectives to be pursued by Member States, periodic reporting through NAPincls, monitoring of policies against a set of common indicators, evaluation through mechanisms of Joint Review by the Commission and Council, and thematic peer-review through contracted research organizations.<sup>68</sup> The OMC on social inclusion can, therefore, plausibly be considered to be a form of “new governance” within the social sphere, in light of its attributes, architecture, and orientation towards stimulating processes of problem-identification and problem-solving. However, the limitations of “new governance” analysis become apparent in two different ways: first, by considering the social inclusion methodology itself; and second, by comparing it to the EES.

Looking at the social inclusion process from the perspective of the “architecture” of new governance, while we can clearly specify the presence of elements of such an architecture, nevertheless, as the architectural metaphor ought to warn us, all sorts of different structures can claim to possess core architectural features, and yet vary widely in terms of their form, functionality, and aesthetic appeal. Take the aspect of peer-review: in the social inclusion process, thematic peer-review, of individual state’s self-chosen policy initiatives by groups of other

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<sup>64</sup> Member States were also invited to submit a subsequent ‘implementation report’ on their 2003-5 NAPincls.

<sup>65</sup> European Commission, *Working Together for Growth and Jobs: A new start for the Lisbon Strategy*, COM (2005) 24..

<sup>66</sup> Commission Communication, *Strengthening the Social Dimension of the Lisbon Strategy: Streamlining Open Coordination in the field of Social Protection*, COM (2003) 261.

<sup>67</sup> Commission Staff Working Document, *Evaluation of the Open Method of Coordination for Social Protection and Social Inclusion*, SEC (2006) 345.

<sup>68</sup> Council Decision of 12 July 2005 on Guidelines for the Employment Policies of the Member States (2005/600/EC) OJ L205/21 at 24.

Member States, was organized and funded through a parallel Community Action Programme.<sup>69</sup> The supporting nature of this programme for the OMC process has always been somewhat ambiguous: it can be argued that some participants in the peer-reviews considered the thematic peer-reviews as somewhat separate from, and possibly more useful than, the other more general elements considered to form part of the OMC proper. In this way, to the extent that learning is an attribute of new governance, there is ambiguity as to whether learning (if it takes place at all) arises specifically from the peer-review methodology, or from the other elements of the OMC process. Another example concerns the NAPincls. Domestic actors often tended to view the NAPincl as being the totality of the OMC with little understanding of the common objectives or indicators that accompanied the NAPincls. In other words, both examples, suggest a severability of elements of the architecture, rather than a systematic interaction of the different parts of the methodology. Although one might suggest that this ought not to deny any given example of OMC the status of “new governance” instrument, it does beg the question as to whether there is any sort of qualitative threshold as to the ability of the architecture to systematize its elements. The same sort of criticism could be applied to an “attributes”-based approach: do all the attributes require being present and does it matter to what degree?

When compared with the EES, the OMC on inclusion exhibits variation which makes it appear both more-and-less “new governance.” It may be said to be more like “new governance” than the EES, in that the processes surrounding the National Action Plans on inclusion became more participative in the second cycle of the process. The specific Nice Objective to “mobilize all relevant actors,” and the perceived criticism in the first Joint Report on the NAPincls for 2001-2003, that civil society had been insufficiently engaged, provided resources for domestic anti-poverty groups—themselves coordinated, to some degree, through association with Commission-funded European-level NGOs like the European Anti-Poverty Network—to seek input and influence over the content of NAPincls (and also acting as an independent source of monitoring and evaluation of the OMC process as applied in the domestic sphere). While this mobilization around the process—and more specifically around the NAPincl element of the process—ought not to be confused with direct participation in domestic policy formation, it nonetheless represented a somewhat more participative process than that which had been developing in the EES. On the other hand, the inclusion process can also be seen as less “new governance” than the EES inasmuch as iterative recalibration of the elements of the methodology is considered by some to be emblematic of “new governance,” as in the case of the flexibility and revisability attribute identified by Scott and Trubek. There is something paradoxical about the inclusion process in this respect: on the one hand, as a non-treaty-based process, the OMC inclusion methodology ought to be capable of change without much difficulty; and on the other hand, the longer time-frame for the process and the broad consensus surrounding the largely non-specific and aspirational Nice Objectives resulted in very little iteration of the process between the first and second cycles. This begs the question whether it is iteration per se that is important, or merely the possibility for revisability in light of information generated by the process that is crucial.

In terms of the “hard” or “soft” law distinction, the OMC process clearly departs from legislative intervention through directives. In that sense, a default categorization places it within the “soft: law category. But the inclusion processes also departs from early attempts to seek con-

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<sup>69</sup> EP and Council Decision 50/2002/EC establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion: *Official Journal* L10 (12.1.2002), pp.1-7. This distinct funding has now been rolled into the overarching PROGRESS Programme for Employment and Social Solidarity: EP and Council Decision 1672/2006/EC: *Official Journal* L315 (15.11.2006), pp. 1-8.

vergence of Member States' social protection policies—through the adoption of recommendations—in its cyclical and systematic interaction of the elements of the methodology. In Borrás and Jacobsson's terms, it is therefore a different form of "soft" law than that traditionally experienced in the social sphere. Again, we suggest that this characterization may borrow more from its "new governance" characteristics than it does from any clear differentiation of the process along a continuum of law. What then of the attributes of "obligation," "precision," and "delegation" as a means of analyzing the inclusion process along a law continuum? Firstly, the process is not formally a matter of "obligation;" but even as an entirely voluntary process, Member States and Accession States have routinely submitted the NAPincls requested by the Council and Commission. Arguably, Member States do not clearly differentiate between obligations to report to Europe that are based on legal texts, and those which are not. This suggests both that Council Conclusions have taken on a quasi-legal nature in being seen as a source of obligation for national administrations (there is no option not to participate in the process) but more significantly, that the question of "obligation" is not reducible to a scale of legal form, but rather to the sense of obligation among the actors concerned. Secondly, as to "precision," the problem in seeking to operationalize this attribute lies in identifying which texts to analyze. The common objectives and the Commission and Council Joint Reports have been cast in rather general terms, leaving it more to the Member States to determine what they take from the process, rather than there being a clear top-down guide. To the extent that Member States alter their behavior in light of the process, it is not necessarily the case that this comes from any particular text. Constructivist interpretations of the OMC process have placed a greater emphasis on ideational change that is not reducible to any given text, precise or otherwise. While this more constructivist approach is useful in thinking about the inclusion process, it still renders the "law-like" nature of the process ambiguous. The issue of "delegation" is an interesting one in the context of OMC. Evidently, within OMC there is no independent dispute resolution mechanism that is typically associated with the delegation metaphor. Courts are unlikely to play a significant role in OMC processes. E.U. institutional actors do, however, carry out a monitoring and evaluation role: they are not testing formal compliance with rules and norms; nor is the role delegated solely to the European Commission, but is instead subject to political influence by the Member States through the Council and the Social Protection Committee. However, it seeks to render Member States accountable for their social inclusion policies, but is this a form of political, rather than legal, accountability? Should we consider it more akin to an OECD form of review or analogous to the reporting and review mechanisms under the European Social Charter?

If we compare the process to the EES, we discover significant variation in the "law-like" nature of the inclusion process. First, the methodology of the OMC process on social inclusion does not derive from the E.C. Treaty but rather represents a novel synthesis of elements of the EES and of the much-recited Lisbon menu of OMC properties.<sup>70</sup> Second, the Member State resisted any attempt to develop E.U.-wide targets for the social inclusion process, and instead national level targets may be set and reported in the NAPincls. Third, there is no possibility

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<sup>70</sup> Lisbon European Council Conclusions (para. 37):

- fixing guidelines for the Union combined with specific timetables for achieving the goals set in the short, medium and long terms;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer-review organised as mutual learning processes.

for recommendations to be addressed collectively or individually to the Member States. In this way, the inclusion process appears more genuinely open than the EES. It is perhaps with this in mind that Rhodes<sup>71</sup>, for example, contrasts the “political” OMC’s, including the social inclusion process, with the more “legal” EES. This implies a somewhat different characterization, namely, that of law/non-law, rather than a differentiation between “soft” and “softer” law. But can the inclusion process be both “soft” law and “non” law?

We conclude that while the twin frameworks of “new governance” and “soft” law point towards the analysis of certain sorts of issue, they come up short in shedding specific light on the OMC inclusion process.

#### **IV.2.2 Phase Two: Streamlining and Rationalizing the OMC on Social Inclusion**

Our task now is to consider the utility of the “new governance” and “hard”/“soft” law frameworks to make sense of change within the inclusion OMC process. In the first years of its inception, there was a general sense, at least among proponents of the idea of E.U. governance, that at this stage of its development, the OMC on inclusion was more like the pre-Phase One stage of the EES (the Essen phase), but with its trajectory inevitably moving towards something like Phase One. In other words, it would become less “soft” over time as iterative phases of revision brought with it clearer targets and more focused indicators, with mechanisms of review drawing clearer lessons for states, particularly those states considered to be poor performers. Coordination would have a clear goal of convergence, rather than leaving it open to Member States to pick and choose what they might need to learn. At the same time, proponents suggested that it would become more “new governance”-like, in the ambition to make the OMC even more participatory.

While the process can make some claims to have become more participative with each cycle, even in Phase One it soon became apparent that it was unlikely that the process would develop along a trajectory of hardening. First, Member States resisted the use of a league table to identify good and bad performing states. This suggested a sharing of responsibilities for analysis between the Commission and the Council, rather than a clear delegation of power to the Commission. Second, E.U.-targets were never agreed. Third, Joint Review never managed to get beyond much more than elaborate re-description of National Action Plans. Last objectives never became more precise. One might suggest that the sense of obligation—at least at the level of compliance with the procedural requirements of the methodology—did increase as repeated iterations of the process created a collective sense of the impossibility of not cooperating. But this characteristic is better explained by a more constructivist framework than the rationalist one underpinning the “legalization” approach.

The more significant development, that requires analysis, concerns the move into a second phase of the OMC. In 2003, the Commission suggested that following the second biennial cycles of NAPincls, the process on inclusion should be streamlined and rationalized into a new overarching OMC process which also included pensions and healthcare. This was presented as a means of ensuring greater visibility for key social messages that would then be capable of transmission from the European Council to the Member States. However, the re-launch of the Lisbon Process in 2005 seemed to put in doubt the possibility that key social messages would be considered as politically salient, and even appeared to question the significance of the so-

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<sup>71</sup> M. Rhodes, ‘Employment Policy: Between Efficacy and Experimentation’ in H. Wallace, W. Wallace and M. Pollack (eds.), *Policy-Making in the European Union* (Oxford: Oxford University Press, 2005).

cial OMC processes. The preceding Kok Report<sup>72</sup> had identified not one social priority for the European Union, and the re-launched Lisbon Process focused squarely on the need to integrate the employment and economic coordination processes: the fate of “satellite” OMC processes remained to be determined. The sense that there was a fading away of commitments to EU social policy resulted in a rearguard action by social NGOs seeking to maintain social cohesion as an objective of the Lisbon Process, and more specifically, to ensure the retention of the social inclusion process in which they had invested heavily. In a parallel process, the European Commission engaged in an evaluation of the OMC process. The result was a new Commission Communication setting out a combined “Social Protection and Social Inclusion” OMC process covering the three areas of social inclusion, pensions, and healthcare.<sup>73</sup>

While the overall architecture of the process has more-or-less remained the same, significant amendments were made to the elements of the OMC methodology. The new process contains overarching objectives as well as specific objectives for social inclusion, for pensions and for healthcare.<sup>74</sup> Mirroring the tripartite objectives, Member States now also produce “National Reports on Strategies for Social Protection and Social Inclusion” with discrete chapters for each of the three areas covered by the OMC process. The National Reports were also to be reduced down to a forty-page document, with the ability to add annexes elaborating on the details. These design changes were a response to competing pressures: (1) a desire to produce a slimmed-down document that would highlight key social messages, while at the same time maintaining some of the detail to facilitate learning between Member States; and (2) a desire to rationalize the processes while maintaining the distinctiveness of the separate processes. The National Reports submitted in the Autumn of 2006 reveal the tensions within this new architecture. The overall size of the reports varies enormously depending in part on whether annexes were incorporated into, or are kept separate from the reports. The chapters on inclusion—an attempt to maintain the distinctive presence of the NAPincls within the overarching process<sup>75</sup>—tended, with some exceptions, to be much longer than the ten-to-fifteen pages

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<sup>72</sup> *Facing the Challenge: The Lisbon strategy for growth and employment*, Report of the High Level Group Chaired by Wim Kok (Luxembourg:OOPEC, 2004).

<sup>73</sup> European Commission, *Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union*, COM (2005) 706.

<sup>74</sup> Overarching Objectives:

(a) social cohesion, equality between men and women and equal opportunities for all through adequate, accessible, financially sustainable, adaptable and efficient social protection systems and social inclusion policies;

(b) effective and mutual interaction between the Lisbon objectives of greater economic growth, more and better jobs and greater social cohesion, and with the EU's Sustainable Development Strategy;

(c) good governance, transparency and the involvement of stakeholders in the design, implementation and monitoring of policy.

Social Inclusion Objectives:

(d) access for all to the resources, rights and services needed for participation in society, preventing and addressing exclusion, and fighting all forms of discrimination leading to exclusion;

(e) the active social inclusion of all, both by promoting participation in the labor market and by fighting poverty and exclusion;

(f) that social inclusion policies are well-coordinated and involve all levels of government and relevant actors, including people experiencing poverty, that they are efficient and effective and mainstreamed into all relevant public policies, including economic, budgetary, education and training policies and structural fund (notably ESF) programs.

<sup>75</sup> In its initial streamlining communication, the Commission had appeared to suggest that a streamlined process might eliminate the NAPincls altogether: however, the response from Member States was that, having established processes around the NAPincls, they were reluctant to then see them disappear.

suggested by the European Commission, albeit significantly shorter (often half the size) of the previous cycles of the NAPincls. Moreover, while some Member States sought to retain the original identity of the NAPincls within this framework,<sup>76</sup> others dropped the use of the term. Perhaps the most radical change has been the reduction in size of the Joint Reports, a feature which began in the second cycle of the process and, has continued under the revised process. Whereas in 2004 the Joint Report on social inclusion, excluding country profiles, was just less than one hundred and fifty pages, in 2005 and 2006, this had shrunk to around a dozen pages. So how well do the analytic frameworks discussed in the earlier sections capture changes within the OMC process on inclusion?

We contend that while the “new governance” literature has a clear utility in indicating the types of features, especially the attributes or architecture of governance, that we might wish to examine, it reveals little about how to measure change, either quantitatively or qualitatively, within any given aspect of the process, or how to think about changes in the quality of the interaction of these features. Should we welcome an attempt to derive clearer social messages communicated to the European Council and then to the Member States, emphasizing an ideal of “steering” and “implementation” by Member States, or instead decry the possible loss of more “bottom-up” learning and the loss of status of the NAPincls (around which much of the participative “new governance” claim was staked). Competing rationales for the modality of governance through OMC are revealed when we consider the changes between the earlier and later phases of the process: a point that is not well captured simply by contrasting the OMC as a “new governance” technique to that of a different, more traditional form of governing.

One argument might be that the changes highlight the openness and revisability of the process through an iterative process of self-evaluation and recalibration of the elements of the methodology. However, the motive forces for change within the policy area have been mixed, reflecting not only the evaluation of the specific OMC process on inclusion, which is perhaps an example of reflexivity, but also a more political debate about the future of social Europe. While one might speak of some iteration, this seems to downplay both the tension between simplification and the possibilities for learning within the process, as well as the highly politicized nature of the re-launch of Lisbon and the need to reformulate social OMC processes to take into account that changed agenda. Indeed, the evaluation of the OMC process on inclusion was over-shadowed by the political repercussions of the re-launched Lisbon Strategy and an increasing sense that the social inclusion process was under threat: hardly conducive to open deliberation on the potential strengths and weaknesses of the process.

In terms of “soft” law, a simply dichotomy of “hard” or “soft” reveals nothing about whether the revised process has become “harder” or “softer”, and there is evident ambiguity as to whether the function of change has been to enhance steering or merely to reduce the reporting burden. Attempts to operationalize the “obligation”-“precision”-“delegation” continuum is as beset with difficulties in describing change within the OMC, as it was in capturing any given phase. For example, are the new objectives more or less precise? In any event, it is perhaps less apparent that it is the new objectives that are the text to be examined for their normative precision when compared with the identification of key priorities for action in the 2005 and 2006 Joint Reports.<sup>77</sup> Regarding “obligation,” the streamlining process was presented as a

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<sup>76</sup> The UK produced a separate NAPincls publication as well as the overarching report.

<sup>77</sup> These priorities were: to increase labor market participation; modernize social protection systems; tackle disadvantages in education and training; eliminate child poverty and enhance assistance to families; ensure decent housing and tackle homelessness; improve access to quality services; and to overcome discrimination and increase the integration of people with disabilities, ethnic minorities and immigrants.

means of hardening Member States' social commitments, and the revised process as indicative of the enduring importance of social policy within the overall Lisbon agenda. Nonetheless, this can be contrasted with a view that streamlining achieved rationalization at the expense of the specific commitment to tackling poverty which is now lost in the overarching process, and the diminished identity of the NAPincl. All this while the new process is overshadowed by a redefinition of Lisbon focused on "growth and jobs." Whatever the interpretation, our point is simply that the framework of "hard" or "soft" law does not best capture these shifting attitudes towards the obligation to make a decisive impact on poverty as first articulated at Lisbon.

## V. Conclusion

Our aim in this Article has been to expose our concerns with the ways in which new and exciting changes in E.U. governance are being described and evaluated. Through an analysis of the literature and case-studies of the European Employment Strategy and the OMC on social inclusion, we have demonstrated what we consider to be the limitations of the "hard" or "soft" law and "new governance" frameworks as currently applied to the OMC. The frameworks, as currently deployed, undersell and under-explain the significant changes that are occurring in the functions and definitions of law, and in the functions and definitions of governance.

While we see little hope of remodelling the "hard" or "soft" law framework to make it work better, we see immense scope for a project reconsidering the definitional boundaries of law and its relationship with other normative techniques, in light of developments such as the OMC. We also consider that "new governance" frameworks offer many interesting points of departure that have yet to be fully developed and applied to the OMC. In particular, comparing designs that *actually* deliver effective internalized problem-solving, with designs which fail to do so, could shed much light on OMC.